NOTES AND COMMENTS

WAS "BIAFRA" AT ANY TIME A STATE IN INTERNATIONAL LAW?

The Nigerian civil war came to an end on Monday, January 12, 1970, when the Biafran Army Chief [1] surrendered to the Nigerian Federal Government in the following terms: "I Major General Philip Effiong, Officer administering the government of the Republic of Biafra now wish to make the following declaration: . . . That the Republic of Biafra ceases to exist." [2] Implicit in this declaration is the notion that Biafra at one point existed as a republic; but did it ever exist as a state in international law? The term "state" has no exact definition, but the essential characteristics of a state in international law are settled. In 1948 Professor Jessup, then the United States Representative to the Security Council, said in advocating the admission of Israel to the United Nations:

> We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world.[3]

Jessup's statement is simply a reformulation of Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States (signed by the United States and certain Latin American countries) which provides:

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.[4]

As to qualification (b) it is not clear whether a fixed territory is essential to the existence of a state. Lauterpacht, in dealing with this problem, states as follows:

> The possession of territory is, notwithstanding some theoretical controversy which has gathered round the subject, a regular requirement of statehood. Without it there can be no stable and active government.[5]

On the other hand, the fact that the frontiers of an entity have not yet been definitely decided does not necessarily constitute an impediment to

[1] On the eve of Biafra's surrender, Odumegwu Ojukwu, the Biafran leader, who led secession, fled the country, leaving his aide to manage the affairs of state.

[2] Nigerian Consulate, New York, Jan. 15, 1970, The Nigerian Round-Up, at 3; New York Times, Jan. 16, 1970, p. 13, cols. 1–2.

[3] U.N. Security Council, 3rd Year, Official Records, 383d meeting 9–12 (1948).

[4] Convention on Rights and Duties of States, Dec. 26, 1933, 165 U.N. Treaty Series 19, at 25 (1936); 28 A.J.I.L. Supp. 75 (1934).

[5] Lauterpacht, Recognition in International Law 30 (1948).

the existence of statehood. In the case of *Deutsche Continental Gas-Gesellschaft* v. *Polish State*, the German-Polish Mixed Arbitral Tribunal said:

> In order to say that a State exists and can be recognised as such . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory. There are numerous examples of cases in which States have existed without their statehood being called into doubt . . . at a time when the frontier between them was not accurately traced.[6]

For example, Israel was admitted as a Member of the United Nations in May, 1949, notwithstanding the fact that its boundaries were not then defined with precision. Recent events show that Israel's boundaries are still not finally determined. It could also be inferred from Israel's situation that a permanent population is not necessarily essential to the existence of a state, since the population of a nascent state cannot be regarded as permanent if her boundaries are still undefined.

Starke singles out qualification (d) as the most important, and interprets this requirement to mean that "a state must have recognized capacity to maintain external relations with other states."[7] It would appear that there is no other way of acquiring this "recognized capacity" than by the grant of formal recognition by existing states. The question of capacity to enter into relations with other states thus shades into the question of the nascent state's being formally recognized by other states. In other words, recognition forms an integral part of that factual situation which must manifest itself before an entity can claim to have attained statehood in international law. The difficulty raised by this last clause of the Montevideo Declaration may be illustrated by the position of Rhodesia. Rhodesia has a permanent population, a defined territory and a government, although in theory Great Britain is still deemed to be representing it *in loco parentis*. In view of Great Britain's refusal to concede the validity of the unilateral declaration of independence, has Rhodesia the capacity to enter into relations with other states? The answer seems to be in the negative because no state has come forward to recognize it. In 1965 the British Embassy in Washington informed the Department of State that Mr. Henry J. C. Hooper was no longer attached to the British Embassy:

> Mr. Hooper sought to remain in the United States as an agent of the Department of External Services, Ministry of Information, Government of Rhodesia. However, since the United States considered Southern Rhodesia to be a territory over which the United Kingdom

[6] 5 Annual Digest of Public International Law Cases 11, at 15 (Case No. 5) (1929–30).

[7] It is interesting to note that Sec. 4 of the Restatement, Second, Foreign Relations Law of the United States, requires not mere capacity to enter into international relations, but actual participation in international relations. This section provides that "state . . . means an entity that . . *engages in foreign relations*" (emphasis added).

> had full and exclusive authority and in no way recognized the rebel regime which had unilaterally declared its independence, Mr. Hooper could not be granted the status of its diplomatic representative.[8]

The position of Biafra was different from that of Rhodesia. Although Biafra had a government, it was very difficult to say that it had a permanent population or a defined territory. These were the very things that the civil war had to decide. But, unlike Rhodesia, Biafra was recognized by few African states. Whenever part of an existing state breaks away to form another independent state, recognition is always controversial; perhaps that was why no country came forward to recognize Biafra until eleven months after secession.[9] That Biafra did not get recognition soon after secession has been ascribed to three main factors:

> the assumption by the Federal Government of the political initiative in the crisis following the creation of states. The Federal Government's firmness in the West which resulted in Chief Awolowo's [10] membership of the Federal Executive Council; and the rapid and effective institution of the economic blocade of the East. With these three moves the Federal Government rapidly showed its determination to oppose secession, a determination which led to the beginning of the war in July 1967.[11]

The first country to recognize Biafra was Tanzania. In a press conference at the State House in Dar-es-Salaam, on April 13, 1968, Mr. Chediel Mgonja, Tanzania's Minister of State for Foreign Affairs, announced that Tanzania had decided to recognize Biafra as "an independent sovereign entity and a member of the community of nations." [12] The Minister then explained that with 30,000 of their number murdered in two major pogroms, the fears of the Easterners were genuine and deep-seated and that these fears were at the root of the fanaticism with which the Biafrans had set up their own state and fought for it. The only way these fears could be eased was by recognition of their existence. After citing other examples of states splitting up (the Mali Federation, the United Arab Republic, and India before partition), he said that the Biafrans had suffered the same fate of rejection within their state that the Jews of Germany experienced. He concluded by saying that Tanzania felt obliged to recognize the setback to African unity which had occurred, since "only by this act of recognition can Tanzania remain true to her conviction that the purpose of Society is the service to man." [13]

[8] Letter from U.S. Representative to the United Nations to the President of the Security Council, Feb. 28, 1966, 54 Department of State Bulletin 588 (1966).

[9] Secession was declared on May 30, 1967 (6 Int. Legal Materials 679–680 (1967)), and the first recognition was given by Tanzania on April 13, 1968; see below.

[10] Chief Awolowo, first Premier of Western Nigeria, is currently the leader of the Yorubas in Nigeria, Vice Chairman of the Federal Executive Council and Federal Commissioner for Finance.

[11] Front-page comment, West Africa, May 25, 1968.

[12] New Nigerian, April 15, 1968, p. 1; 15 Africa Digest 48 (June, 1968). See also New York Times, April 14, 1968, p. 5, col. 1.

[13] New Nigerian, *loc. cit.*; also West Africa, March 25, 1967, p. 395.

Nigeria responded by withdrawing her diplomatic representatives from Dar-es-Salaam and by stating that the Tanzanian decision was contrary to the Charter of the O. A. U. and its principle of respect for the territorial integrity of member countries.[14]

On May 8, 1968, Gabon also announced its recognition of Biafra. In a statement issued after a meeting in Libreville, the Gabon Cabinet declared:

> When one thinks that hundreds of thousands of innocent civilians—women, old men and children—are condemned in an absolutely illegal struggle to pay with their lives for the right of existence recognized to every human being, the Gabon people and Government could not without hypocrisy take refuge behind the principle of so called non-interference in the internal affairs of another state.[15]

Gabon's recognition was followed by that of Ivory Coast on May 14, 1968. An announcement from Abidjan stated that Ivory Coast had recognized Biafra as a sovereign and independent state.[16]

On May 20, Zambia became the fourth country to recognize Biafra as an independent state. In a statement in Lusaka, the Zambian Government said:

> The indiscriminate massacre of innocent civilian population has filled us with horror. . . . The heritage of bitterness stemming from this horrifying war would make it impossible to create any basis for the political unity of Biafra and Nigeria.[17]

The only other country that recognized Biafra during her short life was Haiti.[18]

On July 31, 1968, France apparently moved towards recognition of Biafra. After a Cabinet meeting, the Secretary for Information, M. Dcelle Theule, read a statement saying:

> Independently of its desire to participate to the best of its ability in the humanitarian effort under way, the Government notes that the bloodshed and suffering endured by the peoples of Biafra for more than a year show their will to affirm themselves as a people. Faithful to this principle, the French Government believes that, as a result, the present conflict should be resolved on the basis of the right of peoples to self-determination and implies the undertaking of appropriate international procedures.[19]

Observers later speculated that the reference to "appropriate international procedures" meant that France might give Biafra formal recognition, but France never did so.

Apart from France and Haiti, no other non-African state openly supported Biafra. During the United States presidential campaign of 1968,

[14] 15 Africa Digest 48 (June, 1968).

[15] West Africa, May 18, 1968, p. 593. See also New York Times, May 9, 1968, p. 5, col. 5.

[16] *Ibid.*, May 16, 1968, p. 17, col. 7.

[17] West Africa, May 25, 1968, p. 662; see also New York Times, May 21, 1968, p. 3, col. 7.

[18] Time, Jan. 26, 1970, p. 21.

[19] New York Times, Aug. 1, 1968, p. 3, col. 7; 15 African Digest 92 (October, 1968).

Mr. Nixon urged Washington to "speak out against this senseless tragedy and act to prevent the destruction of a whole people by starvation." Ojukwu hoped that Nixon might alter United States policy and recognize Biafra. However, President Nixon did not extend the hoped-for recognition.[20]

It must be noted that:

(1) Although five countries recognized Biafra, none of the recognizing states established formal diplomatic relations with it. Of course, the formal establishment of diplomatic relations is not a necessary corollary of recognition. Hence Schwarzenberger remarks:

> Even if the existence of a State as an international person is recognized by another State, this does not mean that a State is bound to have dealings with any specific head of government of a recognized State. If it does so, it maintains diplomatic relations with that State; if not, it suspends them. . . .[21]

(2) The five grants of recognition, which all appeared to be *de jure* in nature, were not prefaced by *de facto* recognition.

(3) No country (including those that recognized Biafra) formally granted the status of belligerency to either side in the Nigerian Civil War. The reason would appear to be that the warfare was in the main on land, and foreign states were not sufficiently affected by it to induce them to take this course. The interests and rights of other states are more likely to be affected in a civil war which is wholly or largely maritime or involves the control of ports and adjacent waters by the secessionists than they are when the rebellion takes place mainly on land, as was true in the Nigerian situation.

(4) Apart from humanitarian considerations clearly brought out in the grants of recognition by the four African countries, no other reasons were given by the recognizing states. But the African correspondent of *The Times* (London) has given three possible reasons for the recognition of Biafra by Tanzania:

> . . . President Nyerere has chosen recognition either as a means of forcing the federal government into peace negotiations; that he is deliberately picking a quarrel with the Organization of African Unity; or that he is acting according to suggestions from the Chinese.
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> The last is not as fantastic as it sounds. There is heavy Chinese involvement in Tanzania, and although Peking has not yet taken any overt interest in the Nigerian conflict, the Russians have been giving unequivocal support to the federal government. President Nyerere's move is therefore interpreted in some quarters as an attempt to embarrass Moscow and, incidentally, Britain.[22]

(5) The Organization of African Unity took a strong stand in favor of Nigeria and established a Consultative Committee of six heads of state to

[20] Time, Jan. 26, 1970, p. 21.

[21] Schwarzenberger, A Manual of International Law 33 (3rd ed., 1952); quoted in 2 Whiteman, Digest of International Law 665 (1963).

[22] The Times (London), April 17, 1968, p. 9, col. 3.

look into the Nigerian situation. At the Committee's meeting in Lagos, the capital of Nigeria, Emperor Haile Selassie of Ethiopia said:

> The Organization of African Unity is both in word and deed committed to the principle of unity and territorial integrity of its member states. And when this Mission was established by our organization, its cardinal objective was none other than exploring and discussing ways and means together with and the help of the Federal Government, whereby Nigerian national integrity is to be preserved and innocent Nigerian blood saved from flowing needlessly. The national unity and territorial integrity of member states is not negotiable. It must be fully respected and preserved. It is our firm belief that the national unity of individual African states is an essential ingredient for the realization of the larger and greater objective of African Unity.[23]

It is interesting to note that, despite this strong statement in favor of Nigeria, the O.A.U. did not at any of its subsequent meetings consider the grants of recognition accorded Biafra by the four African states.

(6) The United Nations did not at any time consider the Nigerian civil war or the statehood of Biafra.

The Effect of the Five Recognitions Granted to Biafra

What was the effect of the five grants of recognition to Biafra? There has been much discussion concerning the essential conditions that entitle a new state to recognition. The *Institut de Droit International* in its resolution of April 24, 1936, laid down the following criteria:

> The recognition of a new state is the free act by which one or several states take note of the existence of a human society, politically organized on a fixed territory, independent of any other existing state, capable of observing the prescriptions of international law and thus indicating their intention to consider it a member of the international community.[24]

Although these criteria are comprehensive and reasonable, it must be noted that in practice they are not the *sine qua non* for recognition. In the absence of a supranational[25] entity exercising supreme authority, the act of recognition is still by and large political in nature and the prerogative

[23] Report on the O.A.U. Consultative Mission to Nigeria, at 9.

[24] 1936 Annuaire de l'Institut de Droit International 300–301; quoted by P. M. Brown, "Recognition of Israel," 42 A.J.I.L. 620–621 (1948).

[25] Various legal scholars have argued that this rule of individual recognition through the free choice of states should be replaced by collective recognition through an international organization such as the United Nations. See Quincy Wright, "Some Thoughts about Recognition," 44 A.J.I.L. 548 (1950). Kelsen, in The Law of the United Nations 947 (1951), holds the view that the admission to the United Nations of a community not yet recognized by a Member means that the United Nations has, through the General Assembly and the Security Council, recognized this community as a state, since, according to Art. 4 of the Charter, only states can be admitted to membership. For the opposite view, see 2 Whiteman, Digest of International Law 46 (1963), where De Visscher's Theory and Reality in Public International Law 229–230 (1957) is quoted: "Further, the admission of a State by the organs of the United Nations does not imply its recognition by the States members individually, any more than it entails any obligation on these members to recognize its government or to main-

of an independent sovereign state. Mr. Warren Austin, the American Representative in the Security Council, stated in reply to strong criticisms by the Syrian Representative of the hasty recognition of the Provisional Government of Israel by the United States:

> I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the de facto status of a State.
>
> Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass on the legality or the validity of that act of my country.[26]

It is, however, submitted that this is an overstatement. As the act of recognition produces legal consequences [27] in the sense that it endows an entity with rights and duties under international law,[28] the legality or otherwise of such acts of recognition must necessarily be judged in accordance with international law. Oppenheim-Lauterpacht states:

> Governments do not deem themselves free to grant or refuse recognition to new states in an arbitrary manner, by exclusive reference to their own political interests, and regardless of legal principles.[29]

It is therefore legitimate to examine the legal nature of the recognition which was accorded to Biafra. In doing this, we shall examine the problem under the two principal theories as to the nature, function, and effect of recognition: the declaratory theory and the constitutive theory.

According to the declaratory theory, statehood or the authority of a new government exists as such prior to, and independently of, recognition. Brierly remarks:

> [Recognition] does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them *as* a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state.[30]

The act of recognition is thus a formal acknowledgment of an established situation.[31] Lauterpacht expressed the view that when a political com-

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tain diplomatic relations with it. . . . Neither Article 4 not Article 78 of the Charter is any authority to the contrary. The scope of these provisions is limited to institutional relations regulated by the Charter; in the absence of any explicit provision, they cannot be extended to cover the individual and strictly political relations of the States members."

[26] Ambassador Austin (U.S.A.), U.N. Security Council, 3d Year, Official Records, 294th meeting at 16 (1948); see also Bishop, International Law, Cases & Materials 292 (2nd ed., 1962); Brierly, The Law of Nations 140 (6th ed., 1963).

[27] J. E. S. Fawcett, The Law of Nations 41 (1968).

[28] Schwarzenberger, Manual of International Law 73 (5th ed., 1967).

[29] 1 Oppenheim, International Law 127 (8th ed., H. Lauterpacht, 1955).

[30] Brierly, *op. cit.* note 26 above, at 139.

[31] Starke, An Introduction to International Law 123–124 (5th ed., 1963).

munity has fulfilled the conditions for statehood prescribed by international law, states are under a duty to recognize the community as a state and that this duty obliges states to base their recognition policy upon the requirements of international law, rather than upon their own national interests.[32] It follows from this view that the validity of any declaration of recognition depends on whether or not the entity has fulfilled the requirements of statehood in international law. Schwarzenberger states that "The purpose of recognition is to endow the new entity with capacity, *vis-à-vis* the recognising State, to be a bearer of rights and duties under international law and participate in international relations on the footing of international law."[33] If an entity does not fulfill all the factual conditions of statehood as required by international law, a declaration of recognition by a state is invalid, and any consequential participation by the new entity in international relations cannot be on the footing of international law. A clear example of an illegal and thus invalid recognition is where the act of recognition is premature and thus an unwarranted interference in the affairs of another state.[34] In this connection, Brierly has laid down these guiding principles:

> It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.[35]

In an attempt to solve this important problem, Lauterpacht offers the following suggestions:

> in the case of communities aspiring to independent statehood subsequent to secession from the parent State, the sovereignty of the mother country is a legally relevant factor so long as it is not abundantly clear that the lawful government has lost all hope or abandoned all effort to reassert its dominion. It is a self-deception to assume that a difficult problem has been solved by such statements as the one that the Latin American Republics existed as States as soon as they became independent of the mother country. For the question of actual independence is not one capable of any easy or automatic answer. A temporary success resulting in such independence would not, so long as there exists a reasonable prospect of the mother country reasserting her authority, justify in law the recognition of statehood. The same applies to the assertion that the American Confederacy during the Civil War was, as it claimed to be, a State because it "existed"![36] . . .

Judged by these rough but by no means infallible tests, the recognition of Biafra by Tanzania, Gabon, Ivory Coast, Haiti, and Zambia would

[32] Lauterpacht, *op. cit.* note 5 above, at 6. This view is well summarized in Friedmann, Lissitzyn, and Pugh, *op. cit.* note 8 above, at 165.

[33] Schwarzenberger, *op. cit.* note 28 above, at 73.

[34] Briggs, "Recognition of States," 43 A.J.I.L. 113–121 (1949).

[35] Brierly, *op. cit.* note 26 above, at 138.

[36] Lauterpacht, *op. cit.* note 5 above, at 45–46.

appear to be unjustifiable and illegal in that at the time of recognition "a real struggle" was still proceeding,[37] and it was not "abundantly clear that the lawful government has lost all hope or abandoned all effort to assert its dominion." [38] In other words, the recognition given to Biafra was, in the circumstances, premature, thus "constituting a tortious act against the lawful government [of Nigeria] and thus a breach of international law." [39]

According to the constitutive theory, it is the act of recognition alone which creates statehood. This theory has some inherent difficulties. First, it is capable of creating an international monster in that "the status of a state recognized by state A, but not recognized by state B, and therefore apparently both 'an international person' and 'not an international person' at the same time would be a legal curiosity." [40] The second difficulty is more substantial. How many recognitions will be sufficient to constitute an entity a state in international law? There are at present over 120 independent states in the world. Should all these states recognize an entity before it becomes a state? Or will fifty percent or more of the number be sufficient? It may even appear that certain weight may have to be given to the recognition by the big Powers, such as the United States, the Soviet Union, Great Britain, China and France. As a result of these formidable difficulties, it would be difficult under this theory to conclude that recognition by only five small states was sufficient to constitute Biafra an independent nation.

As it has been shown above, it is very difficult to justify the existence of Biafra as a state under either theory, as it would appear that it received only *premature recognition* "which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid." [41] It is conceded that there are no clearly established customary or conventional rules of international law governing premature recognition; but, as shown above, it seems that the preponderance of juristic opinion is that premature recognition is wrong and illegal in international law. This juristic opinion cannot be lightly dismissed in view of Article 38(d) of the Statute of the International Court of Justice, which enjoins the Court to apply as a secondary source of law "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

In the circumstances, it is difficult to establish that Biafra attained statehood in international law.

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[37] Brierly, *op. cit.* note 26 above, at 138.

[38] Lauterpacht, *op. cit.* note 5 above, at 46.

[39] Higgins, The Development of International Law Through the Political Organs of the United Nations 138 (1963). See also 1 Hyde, International Law 153 (2nd ed., 1945): "The according of recognition to a country still in the throes of warfare against the parent State . . . constitutes participation in the conflict. It makes the cause of independence a common one between the aspirant for it and the outside State. Participation must be regarded as intervention, and therefore essentially antagonistic to that State."

[40] Brierly, *op. cit.* note 26 above, at 138. [41] Lauterpacht, *op. cit.* note 5 above, at 9.

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